IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: PET FOOD PRODUCTS LIABILITY LITIGATION	Civil Action No. 1:07-cv-02867-NLH-AMD

OBJECTION TO PROPOSED SETTLEMENT;
OBJECTION TO CLASS CERTIFICATION;
NOTICE OF INTENTION TO APPEAR; AND
REQUEST TO SPEAK AT THE HEARING
OF OBJECTORS JIM W. JOHNSON AND DUSTIN TURNER

To The Honorable District Judge and Magistrate:

Comes Now Jim W. Johnson and Dustin Turner, ("Objectors"), and file these Objections to the Proposed Settlement and Certification, and Notice of Intent to Appear and Request to Speak at the Hearing, and would show as follows:

1. Party Status

Objectors are members of the settlement class.

Name:	Jim W. Johnson	Name:	Dustin Turner
Address	111 North Shore Drive	Address	P.O. 912
Telephone:	Kerens, Texas 75144	Telephone:	Kemp, Texas 75143

Signature: [signature] Jim Johnson   Signature: [signature] Dustin Turner

Objectors hereby assert status as a party to this proceeding under the U.S. Supreme Court's opinion in *Devlin v. Scardelletti,* 536 U.S. 1 (2002). Objectors assert the rights as a party for all purposes, including, but not limited to, the right to: object to the settlement, receive notice of all hearings, receive copies of all filings by the Settling Parties, participate as a party at all hearings and conferences with the Court in this case, and appeal any decision approving the settlement, award of attorneys' fees, or award of incentive awards.

2. Notice of Intention to Appear

Counsel Jeffrey L. Weinstein, subject to permission by the Court, and Robert Margulies intend to appear on behalf of objectors at the hearing.

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3. Request to Speak at the Hearing

Objectors request that Counsel be allowed to appear at the final approval hearing to talk about these objections and to otherwise participate in the final approval hearing.

4. Objections to Certification of the Settlement Class

The requirements of Rule 23 are not met, so the Court should not certify the proposed class or approve the proposed settlement. Courts across the country have held that a nationwide breach of warranty class cannot be certified. *See e.g., Cole v. General Motors Corp.* 484 F.3d 717 (5th Cir. 2007); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002); *In re Grand Theft Auto Video Game Consumer Litigation*, 2008 WL 2971526 (S.D. N.Y. 2008); *Walsh v. Ford Motor Co.*, 130 F.R.D. 260 (D. D.C.1990)(Variations among states' laws concerning scope and application of warranty claims demonstrated that common issues of law did not exist, precluding certification of class under Magnuson-Moss Warranty Act in action by automobile owners who sought monetary compensation for cost of repairing allegedly defective automatic transmissions).

Courts in this district agree that nationwide breach of warranty classes should not be certified. *See, e.g. Chin v. Chrysler Corp.*, 182 F.R.D. 448 (D. N.J. 1998). As one judge held in a holding that is applies equally to this case:

> [T]he finding that class-wide issues do not predominate over issues involving only individual plaintiffs results from the following three conclusions reached by the court: 1) even the basic question of whether plaintiffs' ignition switches are defective will depend on facts particular to each individual plaintiff; 2) issues such as privity, reliance, and defendants' affirmative defenses may not be adjudicated on a class-wide basis; and 3) the court is compelled to apply the law of each plaintiff's home state to that plaintiff's claims, and thus class-wide disposition of the claims would essentially be impossible.

In Re Ford Motor Co. Ignition Switch Products Liability Litigation, 174 F.R.D. 332, 342 (D. N.J. 1997). All of those problems and more exist here.

In a recent decision in Illinois, the District Court provided a thorough and well-reasoned explanation for denying class certification to nationwide breach of warranty claims like this one. *In re General Motors Corp. Dex-Cool Products Liability Litigation*, 241 F.R.D. 305, 315 (S.D. Ill. 2007). The Court there denied certification of the nationwide class due to the vast differences in states' warranty laws:

> It appears that a large number of states in the proposed class, possibly a majority, hold that reliance is not an element of an express warranty claim. ... However, it appears also that a significant number of other states in the proposed class require specific reliance on a seller's statements as a condition of recovery. ... Finally, it appears that a small minority of the states in the class, including Illinois, follow a

> third approach to reliance, holding that a seller's affirmations and promises relating to goods create a rebuttable presumption of reliance by a buyer.

Id. at 320. That same problem exists here.

Even if a class were certified, the Court would need to appoint separate representatives for the varying groups with conflicting interests. If significant differences in interests exist between different groups within the class, the certification must create subclasses, with separate representatives and class counsel for each subclass. MANUAL FOR COMPLEX LITIGATION 4th, §21.23, p. 272. Moreover, the Court cannot certify the settlement class if the Class Counsel and named Plaintiffs are not adequate representatives of the interests of class members:

> One or more members of a class may sue or be sued as representative parties on behalf of all *only if* ... (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23 (a)(4) (emphasis added).

Settlement is not a cure-all: "[The] other specifications of [Rule 23]-those designed to protect absentees by blocking unwarranted or overbroad class definitions-demand undiluted, even heightened, attention in the settlement context." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620 (1997). These include the requirement that the class representatives' claims be typical of those of the class and that the representatives will adequately protect the class's interests. FED. R. CIV. P. 23(a)(3), (4). Where there are significant differences among subgroups within the class, "the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." *Amchem,* 521 U.S. at 627. *Amchem* clearly stated that the fact that the parties are settling does not erase the need to have separate representatives for all the subgroups in the class:

> The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency. In another asbestos class action, the Second Circuit spoke precisely to this point: "[W]here differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups. The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." *In re Joint Eastern and Southern Dist. Asbestos Litigation*, 982 F.2d 721, 742-743 (1992), modified on reh'g sub nom. *In re Findley*, 993 F.2d 7 (1993).

Id.

The Seventh Circuit has held that separate class representatives must be appointed, even in a settlement class, when the laws of the states differ. *Smith v. Sprint Communications Co.*, 387 F.3d 612, 614-15 (7th Cir.2004). That court went on to point out that if the underlying litigation class cannot be certified, as it could not here, then the class representatives have a very difficult showing that they can adequately represent the interests of the class:

> The nationwide class plaintiffs thus entered negotiations in what the *Amchem* court describes as a "disarmed" state, unable to "use the threat of litigation to press for a better offer," *Amchem*, 521 U.S. at 621, 117 S.Ct. 2231-not a good position from which to represent the interests of parties that do wield such a threat.

Id. at 614. Similarly here, even though this is a settlement class, the Court should not certify the class because (1) separate subclass representatives should have been appointed and (2) the fact that the underlying litigation class could not be certified created a very week bargaining position and prevented the class representatives from adequately representing the class members' interests.

The specific issues that preclude certification and/or require separate class representatives are as follows:

4.1 **Negligence claims**. Individual class member participation is required to prove a negligence claim because the class member would need to prove damages. Similarly, separate subclasses should have been created to represent the interests of those class members who suffered damages and those that did not.

4.2 **Breach v. no breach**. To determine whether there is a breach of warranty and a cause of action for a specific class member, an individual investigation of that class member's tires or paperwork would be necessary. In addition, there is a conflict of interests between class members who have and have not suffered damages.

4.3 **Separate state warranty laws regarding reliance.** As the courts above note, the applicable state warranty laws for class members will differ as to the need for reliance and any presumptions regarding reliance. Thus, for some states individual class member participation would be required. Moreover, separate representatives should have been appointed to account for these differences because class members in some states have stronger claims than class members in other states.

4.4 **Class members in privity and those that are not.** Laws of the states differ as to the rights of consumers not in privity with the Defendant. Courts have declined class certification, at least in part, because of variations in state law regarding privity of contract. *See, e.g., Chin v. Chrysler Corp.*, 182 F.R.D. 448, 460 (D. N.J. 1998)(noting that plaintiffs failed to show that state law differences regarding vertical privity did not pose manageability problems). The proposed class here includes variations in privity – some Defendants sold the pet food directly to the class members and other Defendants are manufactures that are higher in the vertical distribution chain.

5. Objections to the Approval of the Settlement

The settlement is not fair, reasonable, or adequate, and Objector objects to the settlement for the following reasons.

5.1 The settlement fails to take into account the strengths and weaknesses of the claims of different subgroups within the class.

The settlement is not fair, reasonable, or adequate, and Objector objects to the settlement because it fails to take into account the significant differences between the claims of various subgroups, as discussed above. The problems with certification set out above should have been taken into account in dividing up the relief for the class.

For instance, the amounts allocated for the healthy pet screenings and refunds are grossly inadequate. Refunds are limited to $250,000, a mere 1% of the total settlement fund. This is completely inadequate for a nationwide class of millions of consumers. Assume there are 10 million class members: each would get a mere 2.5 cent refund. The $400,000 allocated to healthy pet screenings is even more outrageous: class members who incurred vet bills solely because of the tainted products, bills that probably exceed $50 each and even more, get less than 2% of the total settlement, or 4 cents apiece under the 10 million class member assumption. Class members with healthy pet screening and refund claims were not adequately represented.

5.2 Denial of due process in the claims process

The settlement is not fair, reasonable, or adequate, and Objector objects to the settlement because the claims process, wherein the claims administrator has final say over claims, would deny class members due process. The claims process set up under the settlement provides:

> All decisions of the Claims Administrator shall be final, binding and not subject to appeal.

Settlement Agreement p. 34. Appointing a third party to make the final determination on claims, without any appeal right to the Court, would deny class members' due process rights. *Smith v. Sprint Communications Co.*, 387 F.3d 612, 614 (7th Cir.2004)(overturning a class action settlement that provided that law professors would make determinations regarding claims); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 185 (2nd Cir.1987) (disallowing the administration of class funds by independent foundation without judicial oversight).

5.3 Objection to cy pres

The settlement is not fair, reasonable, or adequate, and Objector objects to the settlement, because it provides that residual monies may be paid to third parties rather than class members who make claims. The Court would abuse its discretion if it were to approve a settlement that gives settlement money to third parties when that money could be paid to class members.

> At such time as all valid Claims properly payable pursuant to the provisions of this Settlement Agreement, are paid in full from the Settlement Fund by the Claims Administrator, the Claims Administrator shall remit the balance, if any, of the Settlement Fund the charities specified on Schedule 1,

Settlement Agreement p. 45. Giving left over money to a third party rather than class members who made claims, would be an abuse of discretion. This abuse of class action settlements, where money due to class members is instead given to third parties, has garnered national attention. A story in the *New York Times* first reported on the abuse. *Doling Out Other People's Money*, *New York Times*, November 26, 2007. According to Samuel Issacharoff, a nationally-recognized class action expert and law professor at New York University, these provisions are "an invitation to wild corruption of the judicial process." *Id.* The *Washington Post* followed that article with an editorial calling for an end to the practice: "In all but the rarest of circumstances, those funds should be made available to individual plaintiffs and not to outside organizations -- no matter how worthy." *When Judges Get Generous: A better way to donate surpluses from class-action awards*, *Washington Post,* December 17, 2007, A20.

Not only are these provisions bad public policy, they fail to satisfy the applicable legal requirements for approving settlements. The Second Circuit has strongly hinted that a district court would abuse its discretion in approving a settlement of an antitrust claim by not giving unclaimed funds to class members who did file claims, rather than to third party charities. *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2nd Cir. 2007). That is the very issue here: whether the court has the discretion to approve a *cy pres* settlement in an antitrust case when the money could, instead, be paid to class members who did make a claim.

Indeed the American Law Institute (ALI) is in the process of adopting a prohibition against this very type of provision in class action settlements. ALI is preparing its "Principles of the Law of Aggregate Litigation," and its Discussion Draft No. 2, dated April 6, 2007, would clearly prohibit these abuses:

> § 3.07 Cy Pres Settlements
>
> … (b) If the settlement involves individual distributions to class members and funds remain after distributions (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable …

Id. § 3.07 (b), at 237-238. Of course, in this case the extra money could easily be given to claimants for no additional costs by simply changing the disbursement formula to eliminate the cap and send one larger check to claimants. The ALI draft reasons:

> Assuming that class members can be reasonably identified and that direct distributions make economic sense, funds may remain because some class

> members could not be identified or chose not to file claims. Under this Section, assuming that further distributions to the previously identified class members would be economically viable, that approach is preferable to cy pres distributions.

Id. at 239. Even if giving this money to claimants would over compensate them, the ALI draft finds that that would be preferable to giving the money to third parties:

> [T]his Section takes the view that distributions to class members better approximate the goals of the substantive laws than distributions to third parties that were not directly injured by the defendant's conduct.

Id. Although the ALI has not finally adopted that document, the reasoning is sound and this Court can and should stop this class action abuse now by disapproving that provision of the settlement.

5.4 The parties failed to meet their burden of proof that the total settlement to the class would be fair, reasonable, or adequate.

Objectors object to the settlement because the parties have failed to meet their burden to prove that the amount of the settlement is fair, reasonable, and adequate. The burden of proof is on the settlement parties, not objectors:

> At the fairness hearing, the proponents of the settlement must show that the proposed settlement is 'fair, reasonable, and adequate.' [979]
>
> 979. *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 316 (3d Cir. 1998) (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995));

MANUAL FOR COMPLEX LITIGATION 4th, §21.634, p. 322. There is no or insufficient evidence to support the finding that the settlement is fair, reasonable, and adequate.

6. Reservation of right to raise further objections

The settling parties have not filed their motions, briefs, or materials in support of the settlement and certification and will not do so by the time objections are due. Therefore, Objectors hereby reserve the right to make additional objections to the settlement and application for attorney's fees in response to those filings.

Wherefore, Objectors pray that the Court disapprove the proposed settlement and certification, and grant Objectors such other and further relief as to which Objectors may be entitled.

Respectfully submitted,

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Subject to Court Approval Pro Hac Vice

ATTORNEYS FOR OBJECTOR

CERTIFICATE OF SERVICE

A copy of the foregoing Objection to Proposed Settlement etc. was on this 2nd day of September, 2008, delivered to the following, as well as filing through ECF.

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